Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-475

BERNARD ALLEN FRIED, JOAN FRIED, COMMUNITY REDEMPTION CORPORATION, AN ILLINOIS CORPORATION, AND CHEROKEE LANDS CORPORATION, AN ILLINOIS CORPORATION,

Petitioners,

vs.

BERNARD CAREY, INDIVIDUALLY, AND AS STATE'S ATTORNEY OF COOK COUNTY, ILLINOIS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Petitioners pray that a Writ of Certiorari issue to the United States Court of Appeals for the Seventh Circuit to review the Order and Judgment of that Court affirming the dismissal of Petitioners' Complaint by the United States District Court on Respondent's Motion to Strike, which Order of affirmance was entered on June 26, 1978.

OPINION BELOW.

The opinion of the United States Court of Appeals is not reported by Order of that Court, and is contained in the Appendix hereto, as is the Decision of the United States District Court.

JURISDICTION.

The Judgment of the United States Court of Appeals for the Seventh Circuit, sought to be reversed, was entered on June 26, 1978. The jurisdiction of this Court is invoked under Title 28, U. S. C., Section 1343(3).

QUESTION PRESENTED FOR REVIEW.

The question presented for review is whether a Complaint which charges a State's Attorney with bad faith, discriminatory and harassing application of a State law, wherein he seeks personal judgments against the Petitioners for unpaid real estate taxes, properly comes under the ambit of Title 28, U. S. C., Section 1343(3), or is absolutely barred by Title 28, U. S. C., Section 1341.

STATEMENT OF THE CASE.

Petitioners-taxpayers complained of the discriminatory, selective attempt by the Respondent-State's Attorney of Cook County, Illinois, to subject them to personal judgments for non-payment of real property taxes solely for the purpose of harassment, under color of a State statute (Section 756, Chapter 120, Ill. Rev. Stats.*).

In spite of the fact that the Respondent, by his Motion to Strike the Complaint, admitted these charges, the United States

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* *Section 756:*

"Suits for taxes on forfeited realty or delinquent personalty. The county board may, at any time, institute suit in a civil action in the name of the People of the State of Illinois in the circuit court for the whole amount due for taxes and special assessments on forfeited property; or any county, city, town, school district or other municipal corporation to which any such tax or special assessment may be due, may, at any time, institute suit in a civil action in its own name, before the circuit court, for the amount of such tax or special assessment due any such corporation on forfeited property, and prosecute same to a final judgment . . ."

District Court dismissed the Complaint chiefly on the ground that Title 28, U. S. C., Section 1341 prohibited a district court from enjoining or restraining the collection of any State tax "where a plain, speedy and efficient remedy is available in the State Court". This Order was affirmed by the United States Court of Appeals.

The facts of the case, all of which are admitted by the Respondent by reason of his Motion to Strike (*Garrett* v. *Bamford*, 538 F. 2d 63, 65 [1976]), simply stated, are as follows:

That the Respondent-State's Attorney of Cook County, Illinois, under color of Section 756, Chapter 120, Ill. Rev. Stats. (which provides for suit to be filed for personal judgments against owners of property forfeited for non-payment of real estate taxes), embarked upon a program of harassing and selective discrimination of enforcement of the statute, directed against these Petitioners.

That as the Complaint charges and the Respondent admits, prior to the institution of the suits by the Respondent against these Petitioners, this very Section 756, under which the Respondent was proceeding, had been used by him, *not* for the purpose of collecting the full amount of the taxes and interest, but for the purpose of *settling and compromising* for a sum less than the amount due for taxes, with other taxpayers similarly situated to the Petitioners.

As further evidence of the Respondent's harassing and discriminatory prosecution of these Petitioners, the Complaint charged that the Respondent purposefully disregarded the liability of previous owners of the very properties owned by the Petitioners, which had been likewise forfeited for non-payment of taxes; and that the records of the tax bodies of Cook County affirmatively disclosed adjoining properties, which were assessed for much greater sums than those of the Petitioners, were not subjected to the suits filed against these Petitioners seeking personal judgments.

That in the more than four years in which the Respondent had been State's Attorney, he had never filed a similar suit seeking a personal judgment against an owner under Section 756.

Further, the Complaint charged that Section 756 of itself was unconstitutional, since it granted an uncontrolled discretion to the County Board of Cook County as to whom it might choose to prosecute for a personal judgment. Secondly, it mandated that the suit be filed for the "whole amount due for taxes and special assessments". Since personal liability for special assessments had been declared unconstitutional by the Supreme Court of Illinois (*City of East St. Louis* v. *Illinois State Trust Co.*, 372 Ill. 120 [1939]), Section 756 mandated the prosecution of a suit based on an unconstitutional statute.

That even if Section 756 be found constitutional, the Respondent's harassing administration of the act deprives Petitioners of the rights, privileges and immunities guaranteed them by the Constitution of the United States, and deprives them of the equal protection of the laws and of due process under the law.

STATUTES INVOLVED.

Petitioners base their case on the provisions of Title 28, U. S. C., Section 1343(3). Respondent urges the prohibition relative to taxes contained in Title 28, U. S. C., Section 1341.

REASONS FOR GRANTING THE WRIT.

The ruling of the United States District Court, affirmed by the United States Court of Appeals, is in direct conflict with the decisions of federal courts all over the country, as well as this Supreme Court, and is the result of a complete misapprehension of the thrust of the Complaint.

It is undenied that the Respondent-State's Attorney, under color of the State law (Section 756), has used the said Section 756, Chapter 120, Ill. Rev. Stats., for the purpose of selectively

discriminating against these Petitioners and in bad faith has prosecuted these Petitioners. This is admitted by his Motion to Strike and Dismiss the Complant. Respondent's only defense is that the District Court has no power under Title 28, U. S. C., Section 1341, to entertain the Complaint. But this is not so—our case is not prohibited from federal intervention under Section 1341. First of all, we are not contesting the tax as such; we do not question the amount of the tax or the validity thereof; we do not seek to stop the State from forfeiting the property for non-payment of taxes, or selling the property at public sale as provided by statute.

Our Complaint is directed to the selective, discriminatory use of a statute which provides that the State may sue for personal judgment against a property owner. It states that the Respondent is guilty of an unconstitutional application of this act against these Petitioners, and cites chapter and verse in support of our contention, all of which is admitted by Respondent's Motion to Strike.

Section 1343(3) was designed specifically to grant federal jurisdiction to intervene in such cases as the one presented here. Respondent's actions are a perfect example of what this Court found obnoxious and unconstitutional in the case of *Yick Wo* v. *Hopkins,* 118 U. S. 373-374 (the administration of an otherwise constitutional act "with an evil eye and an unequal hand").

The lower Courts both also rested on the proposition that the Petitioners had not exhausted their administrative remedies, although we showed, and there was no denial, that there were no administrative remedies available to the Petitioners in this situation. The only administrative remedies provided for in the Revenue Act of the State of Illinois relate only to the contesting of a tax either in amount or as to its validity. No administrative remedy is provided for the rectifying of an act such as complained of here.

In taking refuge behind the provisions of Section 1341, the United States District Court and the United States Court of

Appeals either were unaware of or chose to ignore the legion of numerous decisions of both this Court as well as those of other circuits as well, holding directly to the contrary.

Even though, *arguendo*, Section 756 of the Revenue Act be held constitutional, it is the bad-faith employment of the act for purposes of harassment which mandates federal jurisdiction. *Dombrowski* v. *Pfister*, 380 U. S. 479 (1965).

A systematic undervaluation of other taxable property, the effect of which is an unjust discrimination in taxation, will sustain a federal case to enjoin the collection of the tax (*Louisville Trust Co.* v. *Stone*, 107 Fed. 305), even if the State Court could afford an adequate remedy.

The very case of *Grandco Corp.* v. *Rochford*, 536 F. 2d 197 (7th Circuit, 1976) on which the District Court relied on in its Decision, permitted federal jurisdiction where the plaintiff demonstrates official bad faith or harassment in the enforcement of the statute.

As was said in the case of *District of Columbia Transit System* v. *Pearson*, 149 Fed. Sup. 18:

> "The statutory ban against injunction to restrain collection of taxes is more honored in the breach than in the observance, and upon a showing of considerations that appeal to the discretion of a court of equity, a suit for injunction may be entertained."

The Decision runs counter to that rendered in the case of *Levy* v. *Parker*, 346 F. Sup. 897 (e.d. La. 1972), where the same defense as here was interposed against a suit brought by taxpayers challenging the distribution of state property tax relief funds. There the Court held in sustaining the Complaint:

> "If arbitrary discrimination by the state is demonstrated, the mandate of the equal protection clause is applicable without regard to the manner by which the discrimination is achieved, and when a state law or practice is properly challenged, it is the duty of the federal courts to measure that action against the 14th Amendment."

In the case of *Bohler* v. *Calloway*, 267 U. S. 479 (1925), it was held:

> "It is well settled that if the administration of the tax laws of a state is shown to result in an intentional and systematic discrimination against a complainant by a bill in the Federal Court, the Court may grant relief by injunction under the state law without deciding the federal constitutional question upon which jurisdiction of the bill is based."

Particularly apt are the words of the Court in the case of *Taylor* v. *Louisville and Nashville R. R. Co.*, 88 Fed. 354, 364:

> "We have before us a case in which the complaining taxpayer and other taxpayers owning the same species of property are taxed at a higher rate than the owners of other species of property. This does not come about by legislative discrimination but by the intentional and systematic disregard of the law by those charged with the duty (of collection)."

And in the case of *Johnson* v. *Wells Fargo*, 239 U. S. 234 (8th Cir. 1915), the Court said:

> "Although a taxing statute, upon its face, may be unobjectionable, its administration may, by adoption of unequal method of valuation, be illegal."

Consider the words of this Court in the case of *Hillsborough* v. *Cromwell*, 326 U. S. 620, 623 (1946):

> "The equal protection clause of the 14th Amendment protects the individual from state action which selects him out for discriminatory treatment by subjecting him to taxes not imposed on others of the same class . . . and (P. 636) while the charges of discrimination in the Complaint were denied, the jurisdiction of the District Court is determined by the allegations of the bill."

And in the case of *Spector Motor Service Co., Inc.* v. *McLaughlin*, 323 U. S. 101 (2nd Cir. 1974), the Court, when confronted with the defense of Section 1341, as attempted in

the instant case, said in a suit seeking to enjoin the collector of a State tax:

> "Section 1343(3) permits one to sue for deprivation of *any* (sic) constitutional right . . . the court is charged with the duty of treating Plaintiff's complaint with liberality. *Richardson* v. *Civil Service Commission of the State of New York*, 387 F. Sup. 1267 (1971)".

See also: *Mayor, etc. of Jersey City* v. *Central R. Co., of N. J.*, 212 F. 76 (3rd 1914)

Steffel v. *Thompson*, 415 U. S. 452 (1973)

Southern California Tel. Co. v. *Hopkins*, 13 F. 2d 814 (9th Cir.)

It is admitted by the Motion to Strike and Dismiss that there is no plain, speedy and efficient remedy provided by Illinois Courts under the Revenue Act against the acts complained of by the Respondent. Urging as a defense that the Petitioners must first pay the tax imposed before they can be heard is completely beside the point, since we are not contesting the validity or the amount of the tax in any way; and there is no provision for any hearing by any administrative body or court under such circumstances as are brought by this Complaint. (*U. S.* v. *Livingston*, 179 F. Sup. 9 [1959]; *Joiner* v. *City of Dallas*, 380 F. Sup. 754 [1974]).

In the case of *Yick Wo* v. *Hopkins*, 118 U. S. 373-374, the Court said:

> "Though the law itself be fair on its face and impartial in appearance , yet, if it is applied and administered by public authority with an evil eye and an unequal hand so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of justice is still within the prohibition of the Constitution."

See also: *Garrett* v. *Bamford*, 538 F. 2d 63 (3rd Cir. 1976)

City of Wyandotte, 199 F. Sup. 582, 584 (1961)

Klim v. *Jones*, 315 F. Supp. 109 (1970)

PRAYER FOR WRIT OF CERTIORARI.

WHEREFORE, Petitioners pray that for the foregoing reasons, this Court's Writ of Certiorari should issue to review the Judgment and Opinion of the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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ANdover 3-7875,
Attorney for Petitioners.

APPENDIX.

UNITED STATES DISTRICT COURT,
Northern District of Illinois
Eastern Division

Name of Presiding Judge, Honorable Thomas R. McMillen

Cause No. 77 C 2734 Date Dec. 9, 1977

Title of Cause Fried et al. v. Carey

Motion of defendant to dismiss the complaint is granted and judgment is entered in his favor, with costs. (DRAFT)

Rule 58 entered.

McMILLEN *J.*

UNITED STATES DISTRICT COURT
Northern District of Illinois
Eastern Division

BERNARD ALLEN FRIED, ET AL.,
Plaintiffs,

vs.

BERNARD CAREY,
Defendant.

No. 77 C 2734

DECISION

Plaintiffs have filed a complaint seeking to enjoin the defendant as State's Attorney for Cook County, Illinois from pursuing four lawsuits in the Circuit Court of Cook County to collect property taxes. Plaintiffs also seek a declaratory judgment that *Ill. Rev. Stat.* (1975), Ch. 120, §756 is unconstitutional. Defendant has filed a motion to dismiss which we will grant.

In the first place, this court is not empowered to enjoin, suspend or restrain the collection of any State tax where a plain, speedy and efficient remedy is available in the State court. 28 U. S. C. § 1341. This statute has been applied to actions for declaratory judgment as well as actions for injunctions. *Great Lakes Dredge & Dock Co.* v. *Huffman,* 319 U. S. 293 (1943). Plaintiffs have not exhausted their State court remedy and therefore have not shown that they lack a plain, speedy and efficient form of relief there. Lacking such a showing, we cannot entertain this complaint. *28 East Jackson Enterprises, Inc.* v. *Cullerton,* 523 F. 2d 439 (7th Cir. 1975), cert. den. 423 U. S. 1073 (1976), 551 F. 2d 1093 (7th Cir. 1977).

Secondly, we are not empowered to enjoin State proceedings except under narrowly-stated conditions. 28 U. S. C. § 2283. Although certain civil rights actions are exempted from § 2283

under *Mitchum* v. *Foster,* 407 U. S. 225 (1972), plaintiffs have denied in their answering memorandum that their cause of action is based on 42 U. S. C. § 1983. They have cited or claimed no other exception under the foregoing statutory prohibition.

Finally, the State courts apparently have not passed upon the constitutionality of § 756, and therefore we should refrain from attempting to do so. *Grandco Corp.* v. *Rochford,* 536 F. 2d 197 (7th Cir. 1976); *Ahrensfeld* v. *Stephens,* 528 F. 2d 193 (7th Cir. 1975).

Since our court is precluded by statute and by the rule of comity from entertaining this case, there is no reason to go into the merits of the complaint. Nevertheless, it is our opinion that the defendant in his official capacity had the right and indeed the obligation to file tax collection suits in the name of the People of the State of Illinois and that plaintiffs have alleged no discernible reason why he should be prevented from doing so. He is protected from liability by *McDonald* v. *Illinois,* 557 F. 2d 596 (7th Cir. 1977). Nor can we see any ground whatsoever for doubting the constitutionality of § 756 which merely empowers the County Board to collect taxes and special assessments, which it does through the offices of the defendant State's Attorney. See *People* v. *Kimmel,* 323 Ill. 261, 268 (1926).

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the motion of the defendant to dismiss the complaint is granted, and judgment is entered in his favor, with costs.

ENTER:

THOMAS R. MCMILLEN
Judge, U. S. District Court

Dated: Dec. 9, 1977

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

Submitted: June 21, 1978

June 26, 1978

Before

HON. WALTER J. CUMMINGS, *Circuit Judge*

HON. WILLIAM J. BAUER, *Circuit Judge*

HON. WILLIAM J. CAMPBELL, *Senior District Judge**

BERNARD ALLEN FRIED, ET AL.,
Plaintiffs-Appellants,

No. 78-1191 *vs.*

BERNARD CAREY, ETC.,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 77-C-2734

Thomas R. McMillen, Judge.

ORDER

This matter comes before the court on the filing of the briefs by the parties and on the motion of the appellee for affirmance without oral argument pursuant to Circuit Rule 15. On consideration whereof, we GRANT the motion and AFFIRM the order of the district court.

Plaintiffs-appellants, all owners of tax delinquent Illinois real estate, brought an action in the district court asking that an

* The Honorable William J. Campbell, Senior District Judge of the Northern District of Illinois, sitting by designation.

injunction be issued against defendant Bernard Carey, State's Attorney of Cook County, in order to restrain him from bringing any law suits against them under an Illinois statute which allows suits to be brought for taxes on forfeited realty (*Ill. Rev. Stat.* ch. 120, § 756). Appellants allege that this statute is both unconstitutional on its face and also as applied to them. Further, they aliege that section 756 does not authorize the defendant to bring suit but only grants the Couny Board this authority. Appellants also sought the issuance of a declaratory judgment finding section 756 unconstitutional and finding Carey's enforcement of it against them as a violation of their constitutional rights under the fifth and fourteenth amendments.

The defendant-appellee moved to dismiss the action asserting: (1) a failure of the complaint to state a claim upon which relief may be granted; (2) the bar of 28 U. S. C. § 1341; and (3) abstention. The motion was fully briefed and ultimately granted by the district court on December 9, 1977. It is from this judgment the plaintiffs appeal. The only issue raised on appeal which this court will address is whether or not the district court erred in finding that this action was barred by 28 U. S. C. § 1341.

The district court in its decision stated at the very outset:

> "In the first place, this Court is not empowered to enjoin, suspend or restrain the collection of any State tax where a plain, speedy and efficient remedy is available in the State Court. 28 U. S. C. § 1341." (Mem. Opin. at 2.)

Appellants contend that the district court erred in finding that they were seeking an injunction to restrain the collection of Illinois taxes because the law suits filed by the defendant are not regarded as suits to collect taxes but suits seeking to collect personal judgments.[1] They assert two Illinois cases as affirming

1. A pertinent portion of *Ill. Rev. Stat.* ch. 120, § 756 provides:
Suits for taxes on forfeited realty or delinquent personally.
§ 275. The county board may, at any time, institute suit in a civil action in the name of the People of the State of Illinois

(Footnote continued on next page.)

their position. In *Douthett* v. *Winter*, 108 Ill. 330 (1884), the Illinois Supreme Court indicated that a suit seeking a personal judgment based upon an underlying default on taxes was an *in personam* proceeding and a sale of tax deliquent property was an *in rem* proceeding. The decision was premised upon the decision of *Douthett* v. *Kettle*, 104 Ill. 356 (1882), which held that a sale of land resulting from a deficiency judgment in a tax sale, being an *in personam* action, foreclosed the application of the two year redemption period for property sold directly at a tax sale.

Appellants rely on these two cases only to obfuscate the obvious. While the significance of whether a proceeding is *in rem* or is *in personam* is important vis a vis a homestead exemption (*Winter, supra*), a redemption right (*Kettle, supra*) it is not an important distinction with regard to the purpose for which a proceeding is initiated. Here, the State is quite clearly seeking to obtain delinquent taxes in the only manner legally available to it, that is by proceeding directly against the property owners. In such a situation, the statutory language of 28 U. S. C. § 1341 prohibits interference by the federal courts.

The appellants also argue, without ever conceding that these lawsuits are for the collection of taxes, there is no "plain, speedy and efficient remedy . . . in the courts of [Illinois]" to contest the unconstitutionality of section 756. *Sacks Bros. Loan Co., Inc.* v. *Cunningham*, No. 77-1729 (7th Cir. May 24, 1978); *28 East Jackson Enterprises, Inc.* v. *Cullerton*, 523 F. 2d 439 (7th Cir. 1975), *cert. denied*, 423 U. S. 1073 (1976), *aff'd on rehearing*, 551 F. 2d 1093 (7th Cir. 1977). In their brief and complaint they devote little attention to explaining their position except to assert that the only statutory procedures available are those in which litigants "contest the imposition of the tax in any way whatsoever." They claim that since they have not refused

(Footnote continued from preceding page.)

> in the circuit court for the whole amount due for taxes and special assessments on forfeited property . . . and prosecute the same to final judgment.

to pay the taxes assessed against their property on account of any invalidity or illegality of the assessment or levy, that the usual procedure of paying the taxes under protest and claiming a refund pursuant to *Ill. Rev. Stat.* ch. 120, § 675 is not available to them.

It is apparent to this court that appellants have neither exhausted their state remedies, as is required prior to the filing of this action, nor have they exhausted their efforts in legal research. In *Neal Institute Co.* v. *Stuchhart*, 281 Ill. 526, 117 N. E. 1012 (1918) the Illinois Supreme Court indicated that any defense which might be made in an action for delinquent taxes (*Ill. Rev. Stat.* ch. 120, § 675) can be made under a section 756 proceeding. Because the defenses which can be raised under section 675 are plenary, with the one exception that the real estate is exempt, appellants can present any and all claims including those based on the federal constitution in the state court action.

For the reason that this court finds that the injunctive relief sought is barred by 28 U. S. C. § 1341[2] and because this statute has been applied to actions for declaratory judgment as well as actions for injunctions, *Great Lakes Dredge & Dock Co.* v. *Huffman*, 319 U. S. 293 (1943), we find it unnecessary to address the other issues presented by the appellants on appeal.

For these reasons, it is ordered that the motion for affirmance without oral argument is GRANTED and the district court's order is AFFIRMED.

2. As was noted by this court in *28 East Jackson Enterprises Inc.* v. *Cullerton*, 551 F. 2d 1093, 1096 (7th Cir. 1977):

> "This denial of jurisdiction is complete and applies regardless of whether the tax complaint filed invokes a federal claim alone or in conjunction with state claims. *See Mandel* v. *Hutchinson*, 494 F. 2d 364 (9th Cir. 1974) (in which it was held that the jurisdictional bar of section 1341 was not avoided by challenging state tax statute on federal grounds); *see also* P. Bator, P. Mishkin, D. Shapiro and H. Wechsler, *Hart & Wechsler's The Federal Courts & the Federal System*, 978 (2d ed. 1973). The only concern is whether or not there is an adequate state court remedy for the federal claims."